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90-1019

Supreme Court, U.S.
FILED
DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

NUMBER:

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1990

IMCO, INC., AND JERRY W. IKARD D/B/A
IKARD MANUFACTURING COMPANY,

Petitioners,

V.

CURTIS R. MORTON, Commander
of the United Staes Defense
Contracts Administration Services
Management Area - Birmingham;
MICHAEL P. W. STONE, Secretary
of The United States Department
of the Army; MAURICE H. DEFORD
as Acting Commander of The
United States Army Legal Services
Agency; WILLIAM K. SUTER, Judge
Advocate General of the United
States Department of the Army,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether 15 U.S.C. 637(b)(7)(A) mandates that Unites States Government procurement officers must, prior to precluding a small business concern from being awarded a contract, refer the matter for a final disposition to the Small Business Administration when the basis for preclusion is the small business concern's suspension from contracting because of the Government procurement officers' finding of nonresponsibility because of an alleged unsatisfactory performance on one or more contracts.

LIST OF ALL PARTIES

1. **IMCO, INC.**, an Alabama Corporation. Petitioner herein, Appellant in the Court of Appeals, Plaintiff in the District Court. All of its stock is owned by Jerry W. Ikard. IMCO, INC., has no parent companies, affiliates, or non wholly-owned subsidiaries other than Ikard Manufacturing Company.

2. **Jerry W. Ikard d/b/a Ikard Manufacturing Company**. Petitioner herein, Appellant in the Court of Appeals, Plaintiff in the District Court. Ikard Manufacturing Company is the predecessor business to IMCO, INC., and is wholly owned by IMCO, INC. Ikard Manufacturing Company has no affiliates or non wholly-owned subsidiaries.

3. **Curtis R. Morton**, as Commander of the

United Staes Defense Contracts Administration Services Management Area-Birmingham. Respondent herein, Appellee in the Court of Appeals, Defendant in the District Court.

4. **Michael P. W. Stone**, as Secretary of the United States Department of the Army. Respondent herein, Appellee in the Court of Appeals, Defendant in the District Court.

5. **Maurice H. DeFord**, as Acting Commander of the United States Army Legal Services Agency. Respondent herein, Appellee in the Court of Appeals, Defendant in the District Court.

6. **William K. Suter**, as Judge Advocate General of the United States Department of the Army. Respondent herein, Appellee in the Court of

Appeals, Defendant in the District Court.

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NUMBER:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

IMCO, INC., AND JERRY W. IKARD D/B/A IKARD MANUFACTURING COMPANY,

Petitioners,

V.

CURTIS R. MORTON, Commander of the United States Defense Contracts Administration Services Management Area - Birmingham; MICHAEL P. W. STONE, Secretary of The United States Department of the Army; MAURICE H. DEFORD as Acting Commander of The United States Army Legal Services Agency; WILLIAM K. SUTER, Judge Advocate General of the United States Department of the Army,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

For purposes of clarity, Petitioners

shall be referred to as "Ikard" and Respondents shall be referred to as "Army".

The judgment of the United States Court of Appeals for the Eleventh Circuit, _____ F.2d _____ (1990), dated October 31, 1990, affirming the District Court judgment, is attached in the Appendix at page A-1.

The Opinion of the United States District Court for the Northern District of Alabama, _____ F.Supp. _____ (1990), dated January 12, 1990 and attached in the Appendix at page A-4, dismissed Ikard's cause of action on the grounds Ikard failed to exhaust its administrative remedies.

JURISDICTION STATEMENT

Jurisdiction of this Petition for Writ of Certiorari is conferred upon the United States Supreme Court by Section

1254(1) of Title 28 of the United States Code. Pursuant to Supreme Court Rule 17.1(c), review is sought of the dismissal decree entered by the United States District Court for the Northern District of Alabama and of the order affirming said dismissal by the United States Court of Appeals for the Eleventh Circuit.

STATUTORY PROVISIONS

5 U.S.C. 702 (See Appendix, page A-45)

5 U.S.C. 704 (See Appendix, page A-46)

5 U.S.C. 705 (See Appendix, page A-46)

5 U.S.C. 706 (See Appendix, page A-47)

15 U.S.C. 631 (See Appendix, page A-48)

15 U.S.C. 637(b)(7)(A) (See Appendix, page A-50)

28 U.S.C. 1254(1) (See Appendix, page A-51)

28 U.S.C. 2201 (See Appendix, page A-51)

28 U.S.C. 2202 (See Appendix, page A-52)

28 U.S.C. 1331 (See Appendix, page A-52)

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28 U.S.C. 1391 (See Appendix, page A-53)

FEDERAL ACQUISITION REGULATION PROVISIONS

9.101 (See Appendix, page A-54)

9.104-1 (See Appendix, page A-54)

9.104-3 (See Appendix, page A-55)

9.400 (See Appendix, page A-56)

9.402 (See Appendix, page A-56)

9.406-2 (See Appendix, page A-57)

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Ikard requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit directing said Court to (1) vacate its Order affirming the Order of the United States District Court for the Northern District of Alabama which dismissed Ikard's cause of action and (2) enter an order reversing and

remanding the aforementioned dismissal order and directing the District Court to grant the relief sought in Ikard's Complaint.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW

The Complaint (Appendix page A-23) from which this appeal arises was filed December 29, 1989, seeking declaratory and injunctive relief under the Administrative Procedure Act, as amended, 5 U.S.C. 701 et seq.; the Armed Services Procurement Act of 1947, as amended, 10 U.S.C. 2301-2314; the Small Business Act, 15 U.S.C. 631 et seq.; the Federal Acquisition Regulations, Subpart 9.4 (concerning suspension and debarment), and both the Department of Defense and Army Supplements to said regulations; and the Declaratory Judgments Act, 28 U.S.C. 2201-2202.

Declaratory and injunctive relief was sought by Ikard to stop the Army from refusing to consider Ikard bids submitted in response to Army requests for quotations, invitations for bids, and solicitations on eighteen specific, individual, potential contracts.

The Army refused to consider Ikard's bids because suspension and pending debarment proceedings had been initiated by the Army against Ikard.

The Army's actions violated the Small Business Act, 15 U.S.C. 631 et seq.

The Complaint was properly served on the Army in accordance with Rule 4 of the Federal Rules of Civil Procedure.

Ikard filed a Motion for Preliminary Injunction and Hearing (Appendix page A-16) and accompanying memorandum of law on December 29, 1989. The Army filed Defendants' Motion to Dismiss (Appendix

page A-20) and accompanying memorandum of law on January 8, 1990. Ikard filed a reply memorandum on January 12, 1990.

On January 12, 1990, a hearing was held and United States District Court Judge Sam C. Pointer, Jr., entered an order (Appendix page A-4) denying Ikard's motion for preliminary injunction and granting the Army's motion to dismiss.

Notice of Appeal was filed with the United States Court of Appeals for the 11th Circuit on February 6, 1990. The 11th Circuit, on October 31, 1990, affirmed the United States District Court's Order, and issued as mandate its Judgment on November 26, 1990 (Appendix page A-1).

The case stands before this Court on the issue of whether the United States Court of Appeals for the 11th Circuit

erred in affirming the District Court's dismissal of Ikard's cause of action and denying Ikard's motion for preliminary injunction. The statute erroneously applied is the Small Business Act, 15 U.S.C. 631 et seq., and, in particular, Section 637(b)(7)(A).

C. FACTS

IMCO, Inc. (hereinafter "IMCO"), is an Alabama corporation located at Highway 231-431 North, Meridianville, Alabama. IMCO provides military hardware and sophisticated weapons systems' component parts to United States government agencies. IMCO is wholly owned by Jerry W. Ikard and is a fully qualified participant in the United States Small Business Administrations's (hereinafter "SBA") program for providing contract support and business development assistance to small businesses.

Ikard Manufacturing Company (hereinafter "IMC") was a sole proprietorship owned and operated by Jerry W. Ikard at the time of the suspension, is now owned by IMCO and is also located at Highway 231-431 North, Meridianville, Alabama. IMC provides military hardware and sophisticated weapons systems' component parts to the United States Government agencies. IMC was, at the time of the events complained of, a fully qualified participant in the SBA's program for providing contract support and business development assistance to small businesses.

Jerry W. Ikard (hereinafter "JWI") is the former owner of IMC, is the sole shareholder of IMCO and lives at 151 Becky Dr., Meridianville, Alabama.

Unless distinction of a particular

petitioner is necessary, all are hereinafter referred to as "Ikard".

Curtis R. Morton is the Commander of the United States Army Defense Contracts Administration Services Management Area-Birmingham (hereinafter "DCASMA"). DCASMA administers Ikard's government contracts. Defendant Morton was sued in his official capacity.

Maurice H. DeFord is the acting commander of the United States Army Legal Services Agency (hereinafter ("LSA"). LSA initiated suspension and debarment proceedings against Ikard. Defendant DeFord was sued in his official capacity.

William K. Suter is the Judge Advocate General of the United States Department of the Army (hereinafter "JAG"). JAG also initiated suspension and debarment proceedings against Ikard. Defendant

Suter was sued in his official capacity.

Michael P. W. Stone is the Secretary of The Department of the Army of The United States of America (hereinafter "DOD"). DCASMA, LSA, and JAG are component agencies or divisions of DOD. Defendant Morton was sued in his official capacity.

Unless distinction of a particular respondent is necessary, all are hereinafter referred to as the "Army".

On or about October 19, 1989, the Army mailed letters advising IMCO, IMC and JWI that they were "being considered for debarment by the Department of the Army pursuant to the authority granted by Federal Acquisition Regulation (FAR), Section 9.406". Each letter further advised them their business activities with the Army would be suspended pending resolution of the matter:

> Contractors proposed for debarment are excluded from receiving contracts, and agencies will not solicit offers from, award contracts to, renew or extend existing contracts with, or consent to subcontracts with these contractors, unless the acquiring agency's head or that person's designee determines in writing that there is a compelling reason to do so. Contractors proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors. (emphasis added).

The letter to IMC and JWI also stated:

> The proposed debarment of you and your firm, Ikard Manufacturing Company (IMC) are based upon the chronic failure of IMC to perform in accordance with contractual requirements.

No other grounds for debarment or suspension were alleged against IMC.

The letter to IMCO also stated:

> The proposed debarment of IMCO, Inc., is based upon its affiliation with Jerry Ikard and Ikard Manufacturing Company (IMC).

No other grounds for debarment or suspension were alleged against IMCO.

More than 95% of Ikard's revenues are

from contracts with United States government agencies. Ikard has numerous contracts pending with the Army.

IMCO submitted bids in response to specific Army invitations for bids, requests for quotations, and solicitations. The Army informed IMCO that its bids on eighteen specific, potential contracts would not be considered because of Ikard's pending suspension and debarment.

Even though the Army's suspension and proposed debarment of Ikard is based solely on the issue of Ikard's responsibility, the Army, as a matter of agency and departmental policy, did not refer to the SBA [as required by 15 U.S.C. 637(b)(7)(A)] its refusal to consider Ikard's bids on 18 separate, specific contracts.

Ikard has no adequate remedy at law

and no means for redress of wrongs complained of except through declaratory judgment and mandatory injunction proceedings to review the actions of the Army. Ikard exhausted all mandatory administrative remedies and has and will suffer immediate and irreparable harm unless the declaratory and injunctive relief prayed for is granted immediately.

ARGUMENT FOR ALLOWANCE OF THE WRIT

OVERVIEW

A plaintiff seeking preliminary injunctive relief must show (1) there is a substantial likelihood he will prevail on the merits, (2) the issuance of the injunction will not harm public interest, (3) the plaintiff will suffer irreparable harm if injunctive relief is not granted and (4) he has no adequate remedy at law. The trial court denied Ikard's motion for preliminary injunction and granted the Army's motion to dismiss.

The trial court held "plaintiffs have failed to exhaust their administrative remedies" (Appendix page A-14, footnote 2) and "the Army is not required to refer the matter to the SBA" (Appendix page A-14, footnote 2). The trial court more specifically stated:

> The court concludes that the primary issue in the case is one of law, on which the Army will prevail. . . . The action is dismissed on the grounds that plaintiffs have failed to exhaust their administrative remedies. Plaintiffs argue that the debarment procedure offered by the Army is improper, and that a party is not required to pursue relief through improper administrative channels. The argued impropriety is the Army's failure to refer the matter to the Small Business Administration (SBA). For reasons explained herein, this court concludes that the Army is not required to refer the matter to the SBA. This case, therefore, does not fall within the claimed exception to the requirement of exhaustion of administrative remedies. (Appendix page A-14, footnote 2)

The trial court erred in two respects. First, 15 U.S.C. 637(b)(7)(A) mandates that government procurement officers must, if denying a contract for any reason related to a small business contractor's responsibility, refer the matter for a final disposition to the Small Business Administration. Contrary to the trial court's holding,

suspensions and debarments are, according to Federal Acquisition Regulations, based on a contractor's responsibility. The Army's suspension and proposed debarment should have been referred to the SBA for final disposition.

Second, the Army refused to consider Ikard's bids on 18 different, specific contracts. The Army never referred any of the denials on these 18 specific contracts to the Small Business Administration for a final disposition. Both the letter and the spirit of the Small Business Act mandate referrals of specific contracts. The trial court erred by not requiring the Army to refer these 18 specific contract denials to the SBA.

The Small Business Act, 15 U.S.C. Section 637(b)(7)(A), requires the

referral of all issues of small business responsibility to the SBA. Section 637(b)(7)(A) states, in pertinent part:

> (b) It shall also be the duty of the Administration and it is empowered, whenever it determines such action is necessary--
>
> (7)(A) To certify to Government procurement officers . . ., **with respect to all elements of responsibility**, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a **specific** Government contract. A Government procurement officer . . . may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration. [Emphasis added]

Finally, the explicit Congressional intent for the Small Business Act is to aid, counsel, assist, and protect, insofar as possible, the interests of small-business concerns. The Small Business Administration must act as a

buffer between small businesses and other Government agencies. The trial court's order undermines express Congressional intent for the Small Business Act. Ikard's position is harmonious with and promotes Congressional intent.

The questions are whether the Army must, pursuant to 15 U.S.C. 637(b)(7)(A), [1] refer its decision to suspend and propose debarment of Ikard to the SBA for review or [2] refer its refusal to consider Ikard bids on 18 specific contracts to the SBA for review. If either answer is yes, then Ikard must prevail in this petition.

The trial court used two arguments In ruling against Ikard (Appendix page A-8):

> First, Section 637(b)(7)(A) is by its terms limited to Government action on specific contracts, and is

inapplicable to suspensions and proposed debarments. Second, even if Section 637(b)(7)(A) were applicable to suspensions and debarments, it would not apply in this case.

ARGUMENT: PART I

RESPONSE TO TRIAL COURT'S ARGUMENT That Section 637(b)(7)(A) Is Inapplicable To Suspensions and Proposed Debarments

The trial court found Section 637(b)(7)(A) inapplicable to Ikard's suspension and proposed debarment by asserting it was limited to "specific" contracts. The trial court notes (Appendix page A-8):

> The section refers in its first sentence to a small business's responsibility to perform 'a **specific** Government contract,' and in its second sentence to the Government's denial of '**such** contract' to a small business.

The trial court missed half of Ikard's contention and complaint when it focussed on Section 637(b)(7)(A)'s "specific contract" language. While

Ikard contends the suspension and proposed debarment should have been referred to the SBA pursuant to Section 637(b)(7)(A), Ikard also contends the Army's refusal to consider Ikard bids on 18 separate, specific contracts should have been referred to the SBA. Assuming, arguendo, that the trial court's interpretation of Section 637(b)(7)(A) is correct, the trial court still erred because the Army, **in fact,** failed to comply with Section 637(b)(7)(A)'s mandates on 18 separate, specific contracts!

The trial court gave recognition to Ikard's contention that (Appendix page A-8):

> [T]he statute applies, **a fortiori**, to suspensions and debarments, which implicate many contracts. On this view, it would be absurd to grant a small business lesser protection against an action which carries a

greater danger of harm.

but discarded it by asserting Section 637(b)(7)(A) does not apply to suspension and debarment proceedings because (Appendix page A-9):

> the reasons for suspension and debarment often differ from the reasons for the denial of specific contracts.

While Ikard agrees the specific reasons for a particular suspension and proposed debarment may differ from the specific reasons for the denial of a particular contract, Ikard submits there was no evidence for the trial court to use to apply this exception to Ikard's case.

Further, all of the hearing evidence, statutes and federal regulations indicate the trial court erred in this conclusion. The primary function of both SBA Certificates of Competency and suspension and debarments are the same:

protection of the Government from nonresponsible contractors.

The Federal Acquisition Regulations (hereinafter "FAR") [not cited and totally ignored by the trial court] indicate the overriding public policy concern of suspensions and debarments is the protection of the Government from nonresponsible contractors.

FAR Subpart 9.4 sets forth the policies, procedures and purposes of suspension and debarment proceedings. In particular, FAR Section 9.402 states:

> 9.402 Policy.
>
> (a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts **with responsible contractors only. Debarment and suspension** are discretionary actions that, taken in accordance with this subpart, **are appropriate means to effectuate this policy.**
>
> (b) The serious nature of **debarment and suspension** requires that these sanctions be **imposed only** in the public interest **for the Government's**

> **protection and not for purposes of punishment.** Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart. (Emphasis Added)

Further, the FAR section relied on by the Army to suspend and debar Ikard unambiguously states that responsibility of the contractor is the primary concern. FAR 9.406-2 lists three causes of debarment. Part (a) [inapplicable to the case at bar] refers to convictions and civil judgments for fraud, criminal offenses, antitrust statutes, and the like.

Part (b) [relied on by the Army] refers to serious violations of government contracts. Part (c) is a catch-all clause that helps shed light on the purposes of Parts (a) and (b). FAR 9.406-2(c) states:

> The debarring official may debar a

contractor for any of the causes listed in paragraphs (a) through (c) following:

(c) Any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor. (emphasis added)

Based on FAR 9.402 and FAR 9.406-2, the primary focus of all suspensions and debarments is the responsibility of a Government contractor.

How is "responsibility" determined and what factors must a government contracting officer evaluate in determining a contractor's responsibility? The same factors the SBA examines to determine responsibility for issuance of a Certificate of Competency!

FAR 9.101 is a definitional section. It states a "'Responsible prospective contractor' means a contractor that meets the standards in 9.104."

FAR 9.104, in turn, states, at 9.104-1 (General Standards):

> To be determined responsible, a prospective contractor must--
>
> (a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(b));
>
> (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
>
> (c) Have a satisfactory performance record (see 9.104-3(c));
>
> (d) Have a satisfactory record of integrity and business ethics;
>
> (e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them . . .;
>
> (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(b)); and
>
> (g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

FAR 9.104 further states, at 9.104-3

(Application of Standards):

> (e) Small Business Concerns. If a small business concern's offer that would otherwise be accepted is to be rejected because of a determination of nonresponsibility, the contracting officer shall refer the matter to the Small Business Administration, which will decide whether or not to issue a Certificate of Competency (see Subpart 19.6). (Emphasis added).

These FAR sections undercut the trial court's premise that the SBA's "expertise is irrelevant to the Army's offered reasons for the suspension and proposed debarment of plaintiffs." The trial court is wrong. Rather than the SBA's expertise being irrelevant, the Small Business Act indicates the SBA's expertise regarding small business responsibility is critical!

The trial court also erroneously contended (Appendix page A-10):

> Plaintiffs' suspension and proposed debarment are not based on predictions of plaintiffs' present or future performance. Instead, the Army's

action is, and will be, based on its evaluation of plaintiffs' past performance.

Federal Acquisition Regulations indicate the purpose of suspension and debarments is the exact opposite of the trial court's conclusion.

Contrary to the trial court's finding, responsibility of the contractor is the only issue for FAR suspensions and debarments and, pursuant to FAR 9.104-1, ability to perform in the future is the ultimate focus of responsibility issues. While past performance is a primary factor in evaluating present and future responsibility, it is only one of many factors. The crux of the responsibility issue is whether a contractor will satisfactorily perform in the future.

How do FAR suspension and debarment factors to review compare to the factors the SBA evaluates before issuing a

Certificate of Competency? They are virtually identical. The following chart bears this out.

APPLICABLE FACTORS TO CONSIDER

FAR Suspension and Debarment:	**SBA Certificate of Competency:**
Contractor's Responsibility Is Main Focus?	
Yes	Yes
[FAR 9.104, 9.406-2(c)]	[637(b)(7)(A)]
Responsibility Factors to Consider:	
Capability?	
Yes	Yes
[FAR 9.104-1(a), (b), (e), (f)]	[637(b)(7)(A)]
Competency?	
Yes	Yes
[FAR 9.104-1 (e)]	[637(b)(7)(A)]
Capacity?	
Yes	Yes
[FAR 9.104-1 (f)]	[637(b)(7)(A)]
Credit?	

Yes	Yes
[FAR 9.104-1 (a)]	[637(b)(7)(A)]
Integrity?	
Yes	Yes
[FAR 9.104-1(d)]	[637(b)(7)(A)]
Perseverance and Tenacity?	
Yes	Yes
[FAR 9.104(c), 9.104-3(c)]	[637(b)(7)(A)]

The trial court's conclusion that "this aspect of the debarment renders Section 637(b)(7)(A) inapplicable to the process." (Appendix page A-10) is erroneous because its foundational premise (discussed above) is wrong.

Ikard submits the trial court's reasoning is flawed when it, in one breath, commends the SBA's expertise and purpose (Appendix page A-9):

> The Small Business Act was designed, at least in part, to preclude procurement officers from assuming that small businesses, simply because

> of their size, would be unable to perform specific contracts. The Small Business Administration (SBA) was intended to provide expertise on the capabilities of small businesses.

and then, in the next breath, concludes the SBA's expertise is "irrelevant to the Army's offered reasons for the suspensions and proposed debarment of plaintiffs" (Appendix page A-9, 10).

If the Army had relied on a clearly non-size related action by Ikard (such as a criminal offense or the like), the trial court's reasoning would stand. But the Army does not. The only basis for the suspension and proposed debarment is the issue of Ikard's responsibility as defined by the Federal Acquisition Regulations.

The trial court, just like the Army, is not in its realm of expertise when it concludes, without supporting evidence, that Ikard's past performance record was

not a direct or mitigating result of Ikard's size and status as a small business. As the trial court did indicate, the SBA has, by law and as a matter of fact, developed the expertise needed to determine whether Ikard's small business size was a causal factor of its past performance record and whether its size should have been taken into account when determining Ikard's present responsibility to perform future contracts.

Rather than being a reason for not giving Ikard the benefit of SBA advice and counsel regarding Ikard's responsibility, the SBA's small business expertise is a reason why the issue of Ikard's responsibility <u>should</u> have been referred to the SBA so both Ikard and the Army would benefit from the SBA's small business expertise.

Finally, and because of its reliance on a faulty premise, the trial court concluded (Appendix page A-10, 11):

> [P]laintiffs' argument would produce the implausible result that the Army could never suspend or debar a small business. Though the SBA is empowered to issue certificates of competency to small businesses for specific contracts, the SBA cannot issue blanket certificates of competency such as would be needed to satisfy the Army in this case. Plaintiffs thus would have the Army refer their debarment to an agency with no authority to decide the matter. There is no indication that this extreme result was intended to follow from the Small Business Act.

The trial court misconstrues Section 637(b)(7)(A), the FAR, and Ikard's position.

First, the purpose of the Small Business Act is to protect America's small businesses while they are in their embryonic stage from Government agencies that are overbearing, unsympathetic or out of touch with Congress's policy to

protect and promote small business growth. The trial court's position, not Ikard's, produces an implausible result in conflict with the intent of the Small Business Act.

Second, Ikard's stance does not take from the Army power to initiate suspension and debarment proceedings. It does, however, give small businesses protection from Army overbearance as provided by the Small Business Act. True, and as the trial court points out, the Small Business Act does not give the SBA the power to suspend and debar a contractor . . . but Ikard never contends it does. All Ikard demands is that a suspension and proposed debarment must be referred to the SBA <u>prior</u> to implementation for a final disposition by the SBA. This stance is in accord

with Section 637(b)(7)(A):

> A Government procurement officer . . . may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration. (Emphasis added).

Section 637(b)(7)(A), although not giving the SBA the authority to suspend and debar, does give the SBA oversight authority on Government agency attempts to suspend and debar each time the affected small business contractor is denied specific contract rights. Suspensions and debarments of small businesses may continue provided they take place under the watchful eye of our Government's Congressionally appointed small business guardian . . . the SBA.

The trial court's view that suspensions and debarments need not be referred to the SBA while specific

contracts unrelated to suspensions and debarments are to be referred to the SBA yields incongruous results. The damage done to small businesses by a blanket rejection of a small business's bid on all contracts ("eligibility to solicit") is much greater than that done if a small business is found nonresponsible on just one contract. Rather than being a reason for denying the aid and protection of the Small Business Act to a small business, a blanket suspension and debarment on all contracts is an even more compelling reason for applying the Small Business Act referral requirements to the case at bar.

The trial court's argument is not unlike that of a murderer who claims innocence because he killed not one but eighteen people. The Army, with respect to Ikard, is killed not one contract, it

is killed Ikard's chance to compete on eighteen of them. Surely an exception that devours the rule does not reflect Congressional intent.

ARGUMENT: PART II

RESPONSE TO TRIAL COURT'S SECOND ARGUMENT: Even if Section 637(b)(7)(A) were applicable to suspensions and debarments, it would not apply in this case

The trial court contends, in its second argument, that "[t]he purpose of [Section 637(b)(7)(A)] is to protect small businesses from governmental discrimination on the basis of their size." (Appendix page A-11).

The trial court cites examples of the general rule that:

> When government action towards a small business clearly has nothing to do with the business's size, it would be fruitless to require the involvement of the SBA. See NFK Engineering, Inc. v. United States, 805 F.2d 372, 378 (Fed.Cir. 1986), Electro-Methods, Inc. v. United States, 728 F.2d 1471, 1476 (Fed.Cir., 1984); Siller Brothers,

Inc. v. United States, 655 F.2d 1039, 1044 (Ct.Cl. 1986), cert. denied 456 U.S. 925 (1982).

And concludes that:

> The suspension and proposed debarment of plaintiffs grew out of failure to perform in accordance with contractual requirements. There is no indication that the Army condones similar failures by large companies or that the Army's action is related to plaintiffs' size. Accordingly, plaintiffs' suspension and debarment are not among the actions that must be referred to the SBA. (Emphasis added).

The trial court's logic is faulty in many respects. First, it is contrary to both the intent and letter of the Small Business Act. Assuming, arguendo, that there was in fact "no indication . . . that the Army's action is related to plaintiff's size", that absence is neither relevant nor material.' Section 637(b)(7)(A) does not require referral to the SBA if the prospective contractor is a small business and if the

Government procurement officer's reason for denial directly relate to the size of the business.

Section 637(b)(7)(A) has but two requirements [(1) Small business status and (2) denial based on nonresponsibility]. Proof of a cause and effect between business size and the denial is not one of them. Ikard submits Congress recognized that neither trial courts nor the Army has the level of expertise to evaluate, like the SBA can, the relationship between Ikard's past small business performance record and Ikard's responsibility to be awarded future contracts.

Further, if trial courts must require evidentiary proof of cause and effect between business size and the reason for responsibility-based suspensions and

debarments, then the resulting litigation needed to resolve the evidentiary requirement would unduly burden the SBA, Government agencies, small business contractors and administrative law tribunals while rendering this portion of the Small Business Act impotent. Certainly such was not the intent of Congress.

Third, the holdings relied on by the trial court in NFK Engineering (supra), Electro-Methods (supra), and Siller Brothers (supra) are inapplicable to the case at bar. Ikard agrees these stand for the proposition that:

> When government action towards a small business clearly has nothing to do with the business's size, it would be fruitless to require the involvement of the SBA. (Emphasis added).

But the trial court erred in concluding that a small business's size, as a

matter of law, "clearly" has nothing to do with a small business's degree of responsibility for suspension and debarment purposes.

The cases cited reflect a much more limited view of what is "clear" and what is not. These cases, because of their dissimilar factual situations, do not justify the trial court's new rule of law.

None of the cases address the issue at bar. They relate to (1) criminal conduct by the small business or (2) single contract disqualifications regarding (a) a small business's right to bid on the reletting of a contract on which it had previously performed no work and defaulted or (b) improper conduct so severe as to undermine the integrity of the bidding process.

In NFK Engineering, NFK received inside information on a proposal from the Government's deputy director of the system being bid on. Prior to bid award, the deputy director was given an "exclusive consulting job" with NFK. Shortly after receiving this job and while still deputy director, the contract requirements changed to NFK's benefit and NFK became low bidder. NFK was disqualified because of its relationship with a government employee and the likelihood that it had won the contract because of insider information. The Court upheld the disqualification because NFK's conduct posed a threat to the integrity of the bidding process. NFK's disqualification had nothing to do with its status as a small business enterprise.

Electro-Methods was suspended on the basis of alleged criminal activity (728 F.2d at 1473):

> . . . the [Air Force Debarment and Suspension Review Board] determined that 'adequate evidence', akin to probable cause for a search warrant, existed of wrongdoing and recommended suspension of Electro, among others.

The Air Force's suspension of Electro had nothing to do with Electro's status as a small business enterprise.

Like NFK Engineering and Electro-Methods, Siller Brothers is also limited to its unusual facts.

Siller is not a suspension or debarment case. It is a single contract disqualification case. Siller had a contract to cut 3,390 thousand board feet of timber over a three year period. After three years, Siller had not cut one board foot. The contract was terminated for default. Siller was not

allowed to bid when the contract was readvertised. The Claims Court stated, at 1043:

> Although the language of the second sentence of the section [15 U.S.C. 637(b)(7)(A)] is broad enough to cover the Forest Supervisor's barring of the plaintiff from bidding on the second contract, the legislative history of the provision indicates that it was not intended to apply to this situation.

Further, at 1044:

> The purpose of this provision, as reflected in the legislative history of its predecessors, was to end the discrimination against small business that existed because contracting officers had barred those businesses solely because of their smallness and disabilities **allegedly** resulting from that fact. [Emphasis added]. There is no indication, however, that Congress also intended to cover the situation of the reletting of the contract after a small business firm had defaulted in performance.
>
> The Forest Service regulation does not discriminate against small businesses but generally bars all defaulting contractors from bidding upon the reletting of the contract. The Forest Supervisor refused to allow the plaintiff to participate in rebidding, not because of alleged

> deficiencies stemming from its size, but because of its failure to cut any timber under the prior contract. The result would have been the same if the plaintiff had not been a small business. In the special circumstances of this case -- where the plaintiff had not cut a single foot of timber under the contract for 3 years -- section 637(b)(7)(A) of the Small Business Act did not require the Forest Supervisor to refer the matter to the administrator before he could bar the plaintiff from participating in the rebidding of the contract. [Emphasis added.]

Siller does not stand for the broad proposition promoted by the trial court. To the contrary, the Claims Court went out of its way to state (655 F.2d at 1043):

> [T]he language of the second sentence of the section is broad enough to cover the Forest Supervisor's barring of the plaintiff from bidding on the second contract."

One could reasonably infer from the Claims Court opinion that the Small Business Act does require a referral to the SBA on responsibility-based matters

except when a contractor is attempting to rebid on its own defaulted contract.

The case closest to being on point is Horne Brothers, Inc. v. Laird, 342 F.Supp. 703 (D.C., 1972). Horne Brothers, a small business concern, was suspended by the United States Navy because its conduct indicates (342 F.Supp 705):

> [A] lack of business integrity and [brings] into serious question the present responsibility of your company as a Government contractor.

The suspension was (342 F.Supp 705):

> for a temporary period, pending the completion of the investigation and such legal proceedings which may ensue.

The district court granted Horne Brothers' request for a preliminary injunction staying the Navy's suspension. There were multiple statutory and regulatory violations by

the Navy, one of which was its failure to refer the matter to the SBA. With respect to the SBA, the district court stated, at 342 F.Supp. 707:

> The Navy's letter of December 14, 1971, contained a determination that Horne was not a responsible contractor since it did not have a satisfactory record of integrity, as that term is used in ASPR Section 1-903.1(iv) [ASPR is the predecessor of FAR].
>
> ASPR Section 1-903(iv) has a mandatory reference to ASPR Section 1-7054 [sic] (c)(vi) in the case of a small business concern.
>
> The Navy violated ASPR Section 1-705.4(c)(vi) by determining that Horne, a small business concern, was not responsible because of a lack of business integrity, as defined in ASPR Section 1-903.1(vi) without providing substantial evidence documented in the contract files to the appropriate SBA Regional Office, and to the appropriate departmental Small Business Advisor.

On appeal the United States Circuit Court of Appeals, D.C. Circuit, reversed the district court on other grounds. In so doing, it was careful to note, 463

F.2d 1269-1270:

> we make clear that we agree with the premise of the District Court that there are serious and fundamental questions regarding the fairness of procedures utilized by the Government in suspending contractors. We bring this out in order to avoid misunderstanding, and because it may affect further orders in the lawsuit.

ARGUMENT: PART III

Analysis of the Small Business Act's Congressional Intent and Its Application to Ikard's Position

The trial court's conclusions directly conflict with Congressional intent for the Small Business Act. The Act was designed to promote and protect America's fledgling small businesses. Ikard's position is in accord with the Congressional intent and public policy goals of the Small Business Act. The trial court's interpretation undermines them.

15 U.S.C. 631 states Congress's Declaration of Policy for the Small

Business Act:

> The preservation and expansion of such [free enterprise] competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as it is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services . . . be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the over-all economy of the Nation. [Emphasis Added]

Which position better promotes small business concerns, one which requires referrals to the SBA as a safeguard against Government agencies' disregard for the problems of small businesses or one which takes away the buffer and protection the SBA provides?

The Small Business Act's Legislative History (U.S. Code Congressional and Administrative News, 83rd Congress, First Session, 1953, Volume 2, page 2021) states:

> [The SBA] . . . would be given powers and duties to encourage and assist small-business enterprises in peacetime as well as in any future war or mobilization period. . . . The Small Business Administration would . . . certify to Government procurement officers as to the capacity and credit of small-business concerns to undertake a specific Government procurement contract . . .

While the original Small Business Act limited SBA certificates of competency to capacity and credit, a 1977 amendment strengthened the Act by expanding 15 U.S.C. 637(b)(7)(A) to include "all aspects of responsibility" by adding to "capacity and credit" a small business's "capability, competency, perseverance and tenacity" and by mandating that:

> A Government procurement officer or an officer engaged in the sale and disposal of Federal property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the [SBA].

Congressional intent for the change is reflected in U.S. Code Congressional and Administrative News, 95th Congress, Legislative History, Volume 2, page 833:

> There is, at present, no statutory requirement mandating that once a COC is issued the contract must be let to the small business, nor does the statute include other elements aside from a small business's capacity or credit. This has resulted in severe problems for the small business community.
>
> Small business can and has been denied Government contracts because the procuring activity has determined that the small business lacked the requisite "tenacity, perseverance or integrity" to perform a specific Government contract. Such a finding results in the small firm being branded as "nonresponsible". Resort to the COC procedure in such cases is not available since capacity and credit are, purportedly, not involved. Although SBA normally has the right to

> appeal such determinations to a higher authority within the procuring activity, such action is of questionable value as there is an inherent difficulty in asking a bureaucracy to overrule itself. (Emphasis added).

and further, at 838:

> Title V of this bill would authorize the SBA to make all determinations regarding the responsibility of a small business concern to perform a specific Government contract. The term "responsibility" would include all criteria presently used by procurement officers. The title also provides that a contract may not be withheld for any such reason without referring the matter to the SBA for a determination. [Emphasis Added]

Which position, Ikard's or the trial court's, best reflects Congressional intent to protect and promote small businesses? If appeals by a Government agency as influential and powerful as the SBA "are of questionable value . . . in asking a bureaucracy to overrule itself", what chance does a small business have of successfully appealing

a decision of a part of the Army bureaucracy to another part of the same Army bureaucracy?

Can the trial court's view be consistent with the Congressional intent of the Small Business Act? Surely not.

The problem Congress expressly sought to cure with the 1977 amendment is the problem faced by Ikard. What chance does Ikard have of successfully appealing the suspension and proposed debarment determinations within the Department of Defense when it is Department of Defense agencies that advocate them? What chance is there of this bureaucracy overruling itself? Isn't a final determination of the responsibility issue by the SBA in accord with the express intent of Congress to provide resolution by a disinterested third party? Yes!

Granting Ikard relief inures to the public benefit by promoting the competition and growth of small businesses that is the Congressional purpose of the Small Business Act. Increased growth and competitiveness by small businesses will, in turn, provide government access to more sources for needed parts and supplies and, because of increased competition, will result in reduced prices the government has to pay for those parts and supplies.

CONCLUSION

Based on the foregoing, Ikard's Motion for a Preliminary Injunction was due to be granted and the Army Motion to Dismiss was due to be denied.

Wherefore, Ikard prays this Court will reverse the order and final decision appealed from and remand the action for further proceedings.

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Supreme Court, U.S.
FILED
FEB 25 1991
OFFICE OF THE CLERK

(2)

No. 90-1019

In the Supreme Court of the United States

OCTOBER TERM, 1990

IMCO, INC., ET AL., PETITIONERS

v.

CURTIS R. MORTON, ETC., ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 15 U.S.C. 637(b)(7)(A) requires the Department of Defense to refer to the Small Business Administration the suspension and proposed debarment of a small business before prohibiting that small business from receiving government procurement contracts.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A3) is unreported, but the judgment is noted at 919 F.2d 744 (Table). The decision of the district court (Pet. App. A4-A15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1990. The petition for a writ of certiorari was filed on December 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Defense, like most government agencies, typically procures property and services through a competitive bidding process in which "all responsible sources" may submit sealed bids. See 10 U.S.C. 2304(a)(1)(A); 10 U.S.C. 2302(2)(C)(i); 10 U.S.C. 2302(3); 41 U.S.C. 403(6). However, under the Federal Acquisition Regulation (FAR), 48 C.F.R. Ch. 1, which governs the bidding process, a prospective contractor that has demonstrated a "history of failure to perform, or of unsatisfactory performance of, one or more contracts," is subject to debarment—*i.e.*, exclusion from consideration for further contracts. See 48 C.F.R. 9.406-2(b)(1); 48 C.F.R. 9.403; 48 C.F.R. 9.405(a).

Congress has declared that small businesses should be able to participate in the competitive bidding process. 15 U.S.C. 631(a). To that end, the Small Business Act authorizes the Small Business Administration (SBA) to "certify to Government procurement officers * * * with respect to * * * [the] responsibility * * * of any small business concern * * * to receive and perform a specific Government contract." 15 U.S.C. 637(b)(7)(A). A procurement officer may not preclude a small business from receiving a particular contract for reasons related to responsibility "without referring the matter [to the SBA] for a final disposition." *Ibid.*

The FAR echoes the Small Business Act, and provides that contracting officers must refer determinations of a small business' responsibility to the SBA before they may award a specific contract to another concern. 48 C.F.R. 19.602-1(a). In other words, a particular contract may not be withheld from a small business (and awarded to any other company) on the ground that the small business is not competent to perform that contract, until the SBA has the opportunity to rule on the small business' responsibility. See 48 C.F.R.

Subpt. 19.6. The FAR provides, however, that referral to the SBA for a determination of responsibility is not necessary "if the small business concern * * * [i]s suspended or debarred under * * * [48 C.F.R.] Subpart 9.4." 48 C.F.R. 19.602-1(a)(2)(ii).

2. Petitioners are small businesses engaged in the manufacture of military hardware and component parts for sophisticated weapons systems. Pet. App. A27.[1] In September 1986, petitioners began receiving contracts from the United States Army Missile Command, winning approximately 65 contracts by November 1988.[2] Gov't C.A. Br. 4. During this period, more than half of petitioners' contracts were terminated because of performance failure.[3] *Ibid.*

As a result of this "chronic failure * * * to perform in accordance with contractual requirements," Pet. App. A6, the Army notified petitioners in October 1989 of their suspension and proposed debarment, *ibid.* Accordingly, the Army refused to consider bids submitted by petitioners on 18 new contracts. Pet. App. A34-A35.

3. Rather than await the outcome of an administrative challenge to their proposed debarment, petitioners brought this action in United States District Court for the Northern District of Alabama, seeking a preliminary injunction prohibiting the Army from refusing to consider petitioners' bids

---

[1] Petitioner Ikard is the owner of petitioners IMC and IMCO. Pet. App. A5. For ease of reference, we will refer to all three as "petitioners," although only one of the entities may actually be involved in a given situation.

[2] The 1986 contracts were won following a 1-year debarment in January 1985 for failure properly to perform a number of contracts. Gov't C.A. Br. 4.

[3] Seventeen contracts or purchase orders were terminated because petitioners defaulted on them, and 21 others were terminated for convenience at the request of petitioners. Gov't C.A. Br. 4.

without SBA referral.[4] Pet. App. A16-A17. Petitioners complained that the suspension and proposed debarment violated 15 U.S.C. 637(b)(7)(A), as the Army had not referred the matter to the SBA for that agency's determination of petitioners' responsibility. Pet. App. A6-A7.

The district court denied petitioners' motion for a preliminary injunction and dismissed the case due to petitioners' failure to exhaust their administrative remedies. Pet. App. A13. The court held that Section 637(b)(7)(A) "is by its terms limited to Government action on [a] specific contract and is [therefore] inapplicable to suspensions and proposed debarments," which do not relate to a "specific" contract. Pet. App. A8. The district court explained that "[t]he Small Business Act was designed * * * to preclude procurement officers from assuming that small businesses, simply because of their size, would be unable to perform specific contracts. The [SBA] was intended to provide expertise on the capabilities of small businesses." Here, the court determined, that expertise did not matter, since petitioners' "suspension and proposed debarment [were] not based on predictions [about their] present or future performance," but on evaluation of their actual past performance.[5] Pet. App. A9-A10. SBA referral was therefore not required.

4. The court of appeals summarily affirmed.

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[4] We are informed that the administrative proceedings ultimately resulted in a 2-year debarment, of which petitioners have not sought judicial review.

[5] The court held alternatively that even if Section 637(b)(7)(A) generally applied to suspensions and debarments, it would not apply in this case, because the Act was intended to protect small businesses from discrimination based on size, and the Army's actions were based on petitioners' failure to meet contractual obligations and had nothing to do with petitioners' size. Pet. App. A11-A12.

ARGUMENT

Under the relevant statutes and regulations, the Army was not required to refer petitioners' suspension and proposed debarment to the SBA. Because the holdings of the courts below do not conflict with any decision of another court of appeals or of this Court, further review is unwarranted.

1. The district court correctly held that 15 U.S.C. 637(b)(7)(A) does not apply to suspensions and debarments. By its terms, that provision requires SBA certification only with respect to the responsibility of a small business "to * * * perform a specific * * * contract." The language of the statute is clear and unambiguous, and makes no mention of suspensions or debarments: Congress requires SBA referral only as to specific contracts, and no specific contract is at issue here. That interpretation is confirmed by the FAR, which expressly provides that SBA referral is "not necessary if the small business concern * * * [i]s suspended or debarred," 48 C.F.R. 19.602-1(a)(2)(ii), as petitioners were. Both the statutory language and administrative interpretation require the result reached by the district court and the court of appeals.[6]

Furthermore, the courts of appeals have consistently held that "[t]he purpose of [section 637(b)(7)(A)] * * * was to end the discrimination against small business that existed * * * solely because of their smallness," and therefore, adverse action taken against a small business for reasons not related to its size does not trigger SBA referral. *Siller Bros.* v. *United States*, 655 F.2d 1039, 1044 (Ct. Cl. 1981),

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[6] There is therefore no force to petitioners' argument (Pet. 22-32) that SBA referral was required because suspension and debarment implicate the "responsibility" of a small business, and "responsibility" is the subject of SBA certification under the terms of the statute. Such referral is required only as to a "specific contract."

cert. denied, 456 U.S. 925 (1982); *NFK Eng'g, Inc.* v. *United States*, 805 F.2d 372, 378 (Fed. Cir. 1986); *Electro-Methods, Inc.* v. *United States*, 728 F.2d 1471, 1476 (Fed. Cir. 1984); see also *Shermco Indus., Inc.* v. *Secretary of the Air Force*, 584 F. Supp. 76, 81-87 (N.D. Tex. 1984).[7] Here, as the district court held, petitioners' suspension and debarment "grew out of failure to perform in accordance with contractual requirements," and was unrelated to petitioners' size. Pet. App. A12. Therefore, as the district court held, even if debarment could require SBA referral, it would not have done so in this case.

2. Petitioners incorrectly assert (Pet. 20-21) that SBA referral was required because petitioners made bids on 18 specific contracts. The Army's refusal to consider these bids, however, was based on petitioners' suspension and debarment—which prohibited them from participating in any procurement activity—and not on any factor relevant to the specific contracts at issue. There was therefore no need for SBA's opinion of petitioners' responsibility to perform any of those contracts. Moreover, a prospective contractor must be "otherwise qualified and eligible to receive an award," 48 C.F.R. 9.104-1(g), and suspension and debarment mean, respectively, "disqualification" and "exclusion" from government contracting, 10 U.S.C. 2393(c). Petitioners therefore did not meet the threshold requirements of qualification for consideration of the 18 bids they submitted following their suspension and proposed

[7] Petitioners' reliance (Pet. 46-48) on *Horne Bros.* v. *Laird*, 342 F. Supp. 703 (D.D.C.), rev'd on other grounds, 463 F.2d 1268 (D.C. Cir. 1972), is misplaced because the regulation then in effect has been superseded by 48 C.F.R. 19.602-1, which eliminates SBA referral where there is a suspension or debarment. In addition, petitioners' discussion (Pet. 48-54) of the Small Business Act's legislative history is consistent with the court of appeals' discussion in *Siller Bros.*

debarment. Instead, petitioners' consistent history of inadequate contract performance fully justified their suspension and proposed debarment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1991

U.S. GOVERNMENT PRINTING OFFICE 1991 - 282-061/20400

90-1019

Supreme Court, U.S.
FILED
DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

APPENDIX

NUMBER:

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1990

IMCO, INC., AND JERRY W. IKARD D/B/A
IKARD MANUFACTURING COMPANY,

Petitioners,

V.

CURTIS R. MORTON, Commander
of the United States Defense
Contracts Administration Services
Management Area - Birmingham, etc.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF CONTENTS OF APPENDIX

I certify that the contents of the appendix to be filed in conjunction with this Writ of Certiorari has been compiled in accordance with Rule 21(k) of the Supreme Court of the United States Rule and contains the following portions, and only the following portions, of the record below:

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28 U.S.C. 1361 A-53

28 U.S.C. 1391 A-53

Federal Acq. Regulation 9.101 A-54

Federal Acq. Regulation 9.104-1 A-54

Federal Acq. Regulation 9.104-3 A-55

Federal Acq. Regulation 9.400 A-56

Federal Acq. Regulation 9.402 A-56

Federal Acq. Regulation 9.406-2 A-57

_____

Counsel for Petitioners

1. The Order of the 11th Circuit Court of Appeals from which this Writ of Certiorari derives.

Entered October 31, 1990
Issued as Mandate November 26, 1990

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-7096
Non-Argument Calendar

D.C. Docket No. CV-89-P-2196-S

IMCO, INC.,
IKARD MANUFACTURING COMPANY,
JERRY W. IKARD,

Plaintiffs-Appellants,

versus

CURTIS R. MORTON, Commander of the United States Defense Contracts Administration Services Management Area -Birmingham; MICHAEL P. W. STONE, Secretary of The United States Department of the Army; MAURICE H. DEFORD as Acting Commander of The United States Army Legal Services Agency; WILLIAM K. SUTER, Judge Advocate General of the United States Department of the Army,

Defendants-Appellees,

Appeal from the United States
District Court for the Northern
District of Alabama

Before HATCHETT, EDMONDSON and COX,
Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said district court in this case be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxes by the

Clerk of this Court.

Entered: October 31, 1990

For the Court: Miguel J. Cortez, Clerk

By: Karleen McNabb, Deputy Clerk

ISSUED AS MANDATE: NOV 26 1990

2. The Order of the United States District Court in the Northern District of Alabama, Southern Division, dismissing Petitioner's Complaint Entered January 12, 1990

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA

Southern Division

IMCO, INC., IKARD MANUFACTURING COMPANY, and JERRY W. IKARD,

Plaintiffs;

-vs.- Case No. CV 89-P-2196-S

CURTIS R. MORTON, Commander of the United States Defense Contracts Administration Services Management Area - Birmingham; MICHAEL P. W. STONE, Secretary of The United States Department of the Army; MAURICE H. DEFORD as Acting Commander of The United States Army Legal Services Agency; WILLIAM K. SUTER, Judge Advocate General of the United States Department of the Army,

Defendants.

OPINION

This case involves an effort by plaintiffs to void a suspension order and notice of proposed debarment, based on defendants' failure to refer the matter to the Small Business Administration. 1/ Plaintiffs Ikard Manufacturing Company ("IMC") and IMCO, Inc. ("IMCO"), are small businesses. They have performed projects under contracts with government agencies including the Army. Plaintiff Jerry W. Ikard is the owner of IMC and IMCO. The proposed debarment, if made final, would render plaintiffs ineligible for government contracts for an as-yet undetermined period. Under the terms of the suspension, currently in effect, the Army will not consider plaintiffs' bids on new contracts, and will not grant extensions on existing contracts.

The case is before the court on

plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss. The court concludes that the primary issue in the case is one of law, on which defendants will prevail. Accordingly, plaintiffs' motion for preliminary injunction is to be denied, and defendants' motion to dismiss is to be granted.[2/]

In October 1989, the Army notified plaintiffs of their suspension and proposed debarment. The reason given for the action against IMC and Jerry Ikard was "the chronic failure of IMC to perform in accordance with contractual requirements." The reasons given for the action against IMCO was "its affiliation with Jerry Ikard and Ikard Manufacturing Company."

Plaintiffs argue that the suspension

and proposed debarment are contrary to the Small Business Act. Plaintiffs direct the court's attention to 15 U.S.C. 637(b)(7)(A):

> It shall also be the duty of the [Small Business] Administration and it is empowered, whenever it determines such action is necessary -- . . .
>
> To certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer or an officer engaged in the sale and disposal of Federal property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration.

The court concludes, however, that this section does not require the Army to

refer the present matter to the Small Business Administration. There are two reasons for this conclusion.

First, Section 637(b)(7)(A) is by its terms limited to Government action on specific contract, and is inapplicable to suspensions and proposed debarments. The section refers in its first sentence to a small business's responsibility to perform "a **specific** Government contract," and in its second sentence to the Government's denial of "**such** contract" to a small business. Plaintiffs argue that the statute applies, **a fortiori**, to suspensions and debarments, which implicate many contracts. On this view, it would be absurd to grant a small business lesser protection against an action which carries a greater danger of harm.

The initial appeal of this argument is dispelled by the realization that the reasons for suspension and debarment often differ from the reasons for the denial of specific contracts. In awarding specific contracts, Government procurement officers may be concerned about the present and future ability of businesses to perform the work adequately. The Small Business Act was designed, at least in part, to preclude procurement officers from assuming that small businesses, simply because of their size, would be unable to perform specific contracts. The Small Business Administration (SBA) was intended to provide expertise on the capabilities of small businesses.

Yet this expertise is irrelevant to the Army's offered reasons for the

suspension and proposed debarment of plaintiffs. Plaintiffs' suspension and proposed debarment are not based on predictions of plaintiffs' present or future performance. Instead, the Army's action is, and will be, based on its evaluation of plaintiffs' past performance. This aspect of the debarment renders Section 637(b)(7)(A) inapplicable the process.

Plaintiffs characterize debarment as a judgment that they would be unlikely to perform adequately in future contracts, and argue that this judgment can only be made by the SBA. Yet plaintiffs' argument would produce the implausible result that the Army could never suspend or debar a small business. Though the SBA is empowered to issue certificates of competency to small businesses for

specific contracts, the SBA cannot issue blanket certificates of competency such as would be needed to satisfy the Army in this case. Plaintiffs thus would have the Army refer their debarment to an agency with no authority to decide the matter. There is no indication that this extreme result was intended to follow from the Small Business Act.

Second, even if Section 637(b)(7)(A) were applicable to suspensions and debarments, it would not apply in this case. The purpose of this section of the Small business Act is to protect small businesses from governmental discrimination on the basis of their size. When government action towards a small business clearly has nothing to do with the business's size, it would be fruitless to require the involvement of

the SBA. **See NFK Engineering, Inc. v. United States,** 805 F.2d 372, 378 (Fed. Cir. 1986); **Electro-Methods, Inc. v. United States,** 728 F.2d 1471, 1476 (Fed. Cir. 1984); **Siller Brothers, Inc. v. United States,** 655 F.2d 1039, 1044 (Ct. Cl. 1986), **cert. denied** 456 U.S. 925 (1982). The suspension and proposed debarment of plaintiffs grew out of failure to perform in accordance with contractual requirements. There is no indication that the Army condones similar failures by large companies or that the Army's action is related to plaintiffs' size.[3/] Accordingly, plaintiffs' suspension and proposed debarment are not among the actions that must be referred to the SBA.

In conclusion, this court rejects plaintiffs' contention that the Army's

suspension and proposed debarment of them was invalid for failure to comply with 15 U.S.C. Section 637(b)(7)(a). Based on this conclusion, the court denies plaintiffs' motion for a preliminary injunction. Further, defendants' motion to dismiss is to be granted, as plaintiffs have failed to exhaust their administrative remedies. The court expresses no opinion on the proper outcome of the administrative proceedings with respect to plaintiffs' debarment. Moreover, this court's decision should not affect plaintiffs' right to seek judicial review of any adverse decision at the administrative level.

This the 12th day of January, 1990.

Sam C. Pointer, Jr.
United States District Judge

Footnotes:

1. This opinion will refer to defendants Curtis R. Morton, Michael P. W. Stone, Maurice H. Deford and William K. Suter collectively as "the Army". That term may also, depending on the context, encompass other government officials and employees.

2. The action is dismissed on the grounds that plaintiffs have failed to exhaust their administrative remedies. Plaintiffs argue that the debarment procedure offered by the Army is improper, and that a party is not required to pursue relief through improper administrative channels. The argued impropriety is the Army's failure to refer the matter to the Small Business Administration (SBA). For reasons explained herein, this court concludes that the Army is not required to refer the matter to the SBA. This case, therefore, does not fall within the claimed exception to the requirement of exhaustion of administrative remedies.

3. Plaintiffs contend that any failure to perform according to contract is related to size, and thus that referral to the SBA is mandated. For instance, plaintiffs argue that any delays resulted from the smallness of their workforce. This argument, however, misconstrues the nature of the Small Business Act's ban on discrimination against small businesses. The flaw in the argument can best be seen by an analogy to the Age Discrimination in Employment Act.

If an elderly person is refused a job on the docks solely because he is unable to lift the weights required, there is no discrimination on the basis of age. This is so, even if the elderly person argues that he could lift those weights if he were younger.

3. Plaintiffs' Motion for Preliminary Injunction and Hearing

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IMCO, INC., IKARD MANUFACTURING COMPANY, and JERRY W. IKARD,

Plaintiffs,

vs. Civil Action No. _____

CURTIS R. MORTON, Commander of the United States Defense Contracts Administration Services Management Area - Birmingham; MICHAEL P. W. STONE, Secretary of the United States Department of the Army; MAURICE H. DEFORD as Acting Commander of The United States Army Legal Services Agency; WILLIAM K. SUTER, Judge Advocate General of the United States Department of the Army,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION AND HEARING

Comes now the plaintiffs, IMCO, Inc., Ikard Manufacturing Company,

and Jerry W. Ikard, by and through their undersigned attorney and request this Court to issue a preliminary injunction restraining defendants from refusing to consider bids by plaintiffs on invitations for bids, requests for quotations, and solicitations and from suspending and debarring plaintiffs, based on plaintiffs' alleged lack of responsibility, without first referring the matter of responsibility to the Small Business Administration for final resolution. Plaintiffs further request that this court set a hearing on plaintiffs' Motion for Preliminary Injunction in the above-styled cause on January 19, 1990, or a sooner date at the Court's convenience.

Respectfully submitted,

Morris J. "Mo" Brocks, Jr.
9009 Randall Rd.

Huntsville, AL 35802
(205) 883-7636
(205) 828-3011

CERTIFICATE OF SERVICE

I certify that on the 29th day of December, 1989, I caused to be served a copy of the foregoing document via First Class mail, postage pre-paid, and properly addressed on Mr. Frank J. Donaldson, United States Attorney for the Northern District of Alabama, 200 Federal Courthouse, Birmingham, Alabama 35203; Richard Thornburgh, United States Attorney General, U.S. Dept. of Justice, 10th St. and Constitution Ave., Room 4400, Washington, D.C. 20530; Curtis R. Morton, Commander of the United States Army Defense Contracts Administration Services Management Area - Birmingham, 2121 8th Ave. No., Suite 104, Birmingham, AL 35203-2376; Michael P. W.

Stone, Secretary of The Department of the United States Army, The Pentagon, Room 3E 718, Washington, D.C. 20310-0100; Maurice H. DeFord, Acting Commander of The United States Army Legal Services Agency, Nassif Building, Falls Church, VA 22041-5013; William K. Suter, Judge Advocate General of the United States Army Washington, D.C. 20310-2200.

Morris J. Brooks, Jr.

4. Defendants' Motion to Dismiss

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA

Southern Division

IMCO, INC., IKARD MANUFACTURING COMPANY, and JERRY W. IKARD,

Plaintiffs;

-vs.- Case No. CV 89-P-2196-S

CURTIS R. MORTON, Commander of the United States Defense Contracts Administration Services Management Area - Birmingham; MICHAEL P. W. STONE, Secretary of The United States Department of the Army; MAURICE H. DEFORD as Acting Commander of The United States Army Legal Services Agency; WILLIAM K. SUTER, Judge Advocate General of the United States Department of the Army,

Defendants.

DEFENDANTS' MOTION TO DISMISS

Comes now the defendants, by and through Frank W. Donaldson, United States

Attorney, and Caryl P. Privett and Marvin Neil Smith, Jr., Assistant United States Attorneys for this District, and move the Court pursuant to Rule 12(b), Federal Rules of Civil Procedure, to dismiss the Complaint in the above-styled civil action due to lack of subject matter jurisdiction, insufficiency of service of process, and failure to state a claim upon which relief can be granted.

A memorandum in support of the motion and in opposition to plaintiffs' motion for a preliminary injunction and the Affidavit of James P. Bowers are submitted herewith.

FRANK W. DONALDSON
United States Attorney

CARYL P. PRIVETT
Assistant United States Attorney

MARVIN NEIL SMITH, JR.
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon counsel for the plaintiffs, Morris J. Brooks, Jr., 9009 Randall Road, Huntsville, Alabama 35802, by mailing the same by first class United States mail, properly addressed and postage prepaid on this the 8th day of January, 1990.

MARVIN NEIL SMITH, JR.
Assistant United States
Attorney

5. The Complaint

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IMCO, INC.,
P.O. Box 368
Meridianville, AL 35759-0368

IKARD MANUFACTURING COMPANY
P.O. Box 368
Meridianville, AL 35759-0368

JERRY W. IKARD
151 Becky Dr.
Meridianville, AL 35759

Plaintiffs

Civil Action No. _____

vs.

CURTIS R. MORTON, in his official capacity, Commander of the United States Army Defense Contracts Administration Services Management Area - Birmingham
2121 8th Ave. No., Suite 104
Birmingham, AL 35203-2376

MICHAEL P. W. STONE, in his official capacity, Secretary of The Department of the United States Army The Pentagon
Room 3E 718
Washington, D.C. 20310-0100

MAURICE H. DEFORD, in His
Official Capacity as Acting
Commander of The United
States Army Legal
Services Agency
Nassif Building
Falls Church, VA 22041-5013

WILLIAM K. SUTER, in His
Official Capacity as Judge
Advocate General of the
United States Army
Washington, D.C. 20310-2200

Defendants

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Comes IMCO, Inc., a corporation located in and created under the laws of the State of Alabama; Ikard Manufacturing Company, a sole proprietorship owned, at the time of suspension, by Jerry W. Ikard, and now owned by IMCO, INC.; and Jerry W. Ikard, plaintiffs herein, by and through their undersigned counsel, and complain of Curtis R. Morton, in his official capacity as Commander of United

States Army Defense Contracts Administration Services Management Area - Birmingham; Michael P. W. Stone, in his official capacity as Secretary of the United States Department of the Army; Maurice H. DeFord in His Official Capacity as Acting Commander of The United States Army Legal Services Agency; and William K. Suter, in his official capacity as Judge Advocate General of the United States Army; jointly and severally, defendants herein, and show unto the Court as follows:

1. This civil action for declaratory and injunctive relief arises under the Administrative Procedure Act, as amended, 5 U.S.C. 701 et seq.; the Armed Services Procurement Act of 1947, as amended, 10 U.S.C. 2301-2314; the Federal Acquisition Regulations, Subpart

9.4 concerning Suspension and Debarment, and both the Department of Defense and Army Supplements to said regulations; the Small Business Act, 15 U.S.C. 631 et seq.; and the Declaratory Judgments Act, 28 U.S.C. 2201-2202.

JURISDICTION

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1331 and 1361. An actual and justiciable controversy exists between the plaintiffs and the defendants as to which the plaintiffs require an immediate and definitive declaration of their rights by this Court and both interim and permanent injunctive relief.

VENUE

3. Venue is proper in this district under 28 U.S.C. 1391(e)(1), (2) and (4).

THE PARTIES

4. IMCO, Inc., (hereinafter "IMCO") is a corporation created under the laws of the State of Alabama, and is located at Highway 231-431 North, Meridianville, Alabama. IMCO, Inc., is a fully qualified participant in the United States Small Business Administrations's program for providing contract support and business development assistance to small businesses, which provides military hardware and sophisticated weapons systems' component parts to the United States Government agencies.

5. Ikard Manufacturing Company (hereinafter "IMC") is a sole proprietorship owned and operated by Jerry W. Ikard at the time of suspension, is now owned by IMCO, Inc., and is located at Highway 231-431 North, Meridianville, Alabama. Ikard

Manufacturing Company is a fully qualified participant in the United States Small Business Administrations's program for providing contract support and business development assistance to small businesses, which provides military hardware and sophisticated weapons systems' component parts to the United States Government agencies.

6. Jerry W. Ikard (hereinafter "Ikard") is the former owner of Ikard Manufacturing Company, is the sole shareholder of IMCO, Inc., and lives at 151 Becky Dr., Meridianville, Alabama.

7. Curtis R. Morton is the Commander of the United States Army Defense Contracts Administration Services Management Area - Birmingham (hereinafter DCASMA). DCASMA administers most, if not all, of plaintiffs' contracts for

military hardware and sophisticated weapons systems' component parts. Defendant Morton is sued in his official capacity and the allegations set forth herein as to him are not limited to him individually, but extend to his supervisors and personnel working under this direction.

8. Maurice H. DeFord is the acting commander of the United States Army Legal Services Agency (hereinafter "LSA"). LSA has initiated suspension and debarment proceedings against the plaintiffs. Defendant Maurice H. DeFord is sued in his official capacity and the allegations set forth herein as to him are not limited to him individually, but extend to his supervisors and personnel working under his direction.

9. William K. Suter is the Judge

Advocate General of the United States Department of the Army (hereinafter "JAG"). JAG has initiated suspension and debarment proceedings against the plaintiffs. Defendant Suter is sued in his official capacity and the allegations set forth herein as to him are not limited to him individually, but extend to his supervisors and personnel working under this direction.

10. Michael P. W. Stone, is the Secretary of The Department of the Army of The United States of America (hereinafter "DOD"). DCASMA, LSA, and the JAG are component agencies or divisions of DOD. Defendant Morton is sued in his official capacity and the allegations set forth herein as to him A- are not limited to him individually, but extend to his supervisors and personnel

working under this direction.

FACTS

11. On or about October 19, 1989, Defendant LSA mailed letters (Exhibit A and B) advising plaintiffs they were "being considered for debarment by the Department of the Army pursuant to the authority granted by Federal Acquisition Regulation (FAR), section 9.406."

12. Said letters further advised plaintiffs that their business activities with defendants would be suspended pending resolution of the matter, to-wit: "Contractors proposed for debarment are excluded from receiving contracts, and agencies will not solicit offers from, award contracts to, renew or extent to subcontracts with these contractors, unless the acquiring agency's head or that person's designee determines in

writing that there is a compelling reason to do so. Contractors proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors." (emphasis added).

13. The letter to IMC and Ikard states that "The proposed debarment of you and your firm, Ikard Manufacturing Company (IMC) are based upon the chronic failure of IMC to perform in accordance with contractual requirements."

14. The letter to IMCO, Inc., states that "The proposed debarment of IMCO Inc. is based upon its affiliation with Jerry Ikard and Ikard Manufacturing Company (IMC)." No other grounds for debarment or suspension are alleged against IMCO, Inc.

15. IMCO's government contracts

performance record is good and is not a basis on which defendants rely in seeking IMCO's suspension and debarment.

16. More than 95% of the revenues of both IMCO and IMC come from contracts with various agencies of the United States government. Plaintiff have numerous contracts pending with defendants.

17. IMCO and IMC are small businesses within the meaning of the Small Business Act (15 U.S.C. 631, et. al.).

18. Defendants are required by the Small Business Act, 15 U.S.C. Section 637 (b)(7)(A), to-wit:

> (b) It shall also be the duty of the Administration and it is empowered, whenever it determines such action is necessary--
>
> (7)(A) To certify to Government procurement officers . . ., with

> respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer . . . may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration. [emphasis added]

to refer plaintiffs' suspensions, proposed debarments, and exclusion from consideration of bids on particular contracts to the Small Business Administration (hereinafter "SBA").

19. IMCO has submitted bids in response to United States Department of the Army, United States Army Missile Command, invitations for bids, requests for quotations, and solicitations. The United States Army Missile Command sent letters to IMCO advising it that its bids

on DAAH01-89-B-A170 (Exhibit C), DAAH01-89-T-4825 (Exhibit D), DAAH01-89-T-5330 (Exhibit E), DAAH01-89-T-3834 (Exhibit F), DAAH01-89-T-5410 (Exhibit G), DAAH01-90-B-A011 (Exhibit H), DAAH01-89-R-A402 (Exhibit I), DAAH01-89-T-3230 (Exhibit J), DAAH01-89-B-A193 (Exhibit K), DAAH01-89-B-A316 (Exhibit L), DAAH01-90-T-0182 (Exhibit M), DAAH01-90-T-0099 (Exhibit O), DAAH01-90-B-A004 (Exhibit P), DAAH01-89-B-A155 (Exhibit Q), DAAH01-89-B-A400 (Exhibit R), DAAH01-89-B-A190 (Exhibit S), DAAH01-89-T-4304 (Exhibit T), and DAAH01-90-T-0117 (Exhibit U), would not be considered because of IMCO's suspension and pending debarment proceedings.

20. Even though defendants' suspension and proposed debarment of plaintiffs is based solely on the issue

of plaintiffs' responsibility, defendants precluded IMCO's bids from being considered on each of the foregoing invitations for bids, requests for quotations, and solicitations without referring the matter for a final disposition to the Small Business Administration.

21. Defendants, as a matter of agency and departmental policy and because of the suspension and proposed debarment of plaintiffs, are not considering any of plaintiffs' pending bids on government contracts and will not consider any of plaintiffs' future bids on government contracts.

22. Defendants, as a matter of agency and departmental policy, will not refer to the Small Business Administration any future denials by

defendants of consideration of plaintiffs' bids.

23. In the absence of defendants' referral of the issue to the SBA, defendants lack the legal authority to suspend or debar plaintiffs, lack the legal authority to refuse to consider plaintiffs' bids on individual contracts and are violating the Small Business Act.

24. By reason of the wrongful acts and the unlawful suspension and debarment of the plaintiffs by the defendants, plaintiffs have been, are now, and in the future will be illegally denied their right to contract with the United States government and its agencies and will be denied their right to seek modifications of contracts plaintiffs are now performing on behalf of the United States government.

25. As a consequence of defendants' pre-hearing suspension of the plaintiffs, the plaintiffs have been, are now, and will be suffering irreparable injury.

26. It is a system-wide agency policy of defendants to suspend and debar small business contractors without complying with the mandates of 15 U.S.C. Section 637 (b)(7)(A).

27. Plaintiffs have no adequate remedy at law and have no means for redress of wrongs they herein complain except through declaratory judgment and mandatory injunction proceedings to review the actions of the defendants and to order said defendants to cease and desist any and all suspension and debarment activities against plaintiffs until such time as defendants comply with 15 U.S.C. 637 (b)(7)(A).

STATEMENT OF ENTITLEMENT TO

INTERIM INJUNCTIVE RELIEF

28. An actual controversy exists between plaintiffs and defendants that is definitive, real, concrete and substantial and admits of an immediate and definite determination of plaintiffs' rights.

29. Defendants' refusal to consider IMCO's bids reflect a decision by defendants to disallow all of plaintiffs' bids on pending requests for quotations, invitations for bids, solicitations and the like.

30. Defendants' disallowance of past and future bids by plaintiffs on pending requests for quotations, invitations for bids, solicitations and the like is a clear and prejudicial violation of applicable constitutional,

statutory and regulatory law regarding the suspension and debarment of a federal contractor.

31. The unlawful actions of the defendants hereinabove described significantly undermine the integrity of the federal procurement process, the operation of which, in accordance with applicable federal, constitutional, statutory and regulatory law, is of substantial public interest.

32. In the absence of immediate court intervention compelling defendants to comply with the mandates of 15 U.S.C. 637 (b)(7)(A), defendants may officially debar plaintiffs as soon as January 2, 1990.

33. Plaintiffs have exhausted all mandatory administrative remedies, have no adequate remedy at law, and will

suffer immediate and irreparable harm unless the declaratory and injunctive relief prayed for herein is granted immediately.

REQUEST FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court grant the following relief:

(1) Enter a judgment pursuant to 5 U.S.C. 706 and 28 U.S.C. 2201 and 2202 declaring defendants' action in suspending plaintiffs and in seeking a debarment of plaintiffs solely on the basis of responsibility without referring the matter to the Small Business Administration is illegal, arbitrary, capricious and an abuse of discretion and is a clear violation of 15 U.S.C. 637 (b)(7)(A) and, further, that plaintiffs' bids should not be have been excluded

from consideration on defendants' requests for quotations, invitations for bids and solicitations and should not, in the future, be excluded from consideration without the matter of plaintiffs' responsibility being first referred to the Small Business Administration.

(2) Enter preliminary and permanent injunctions enjoining defendants, their departments, employees, officers, servants, agents and other representatives, and those acting in concert with them, from engaging in further unlawful acts of termination, suspension and debarment of plaintiffs, based on plaintiffs' alleged lack of responsibility, without first referring the matter to the Small Business Administration as required by 15 U.S.C.

637 (b)(7)(A).

(c) Grant plaintiffs its costs and attorneys' fees in undertaking this action, and such other and further relief as this Court deems just and proper.

Respectfully submitted this the 29th day of December, 1989.

Morris J. "Mo" Brooks, Jr.
Attorney for Plaintiffs
9009 Randall Rd.
Huntsville, AL 35802
(205) 883-7636
(205) 828-3011

VERIFICATION

STATE OF ALABAMA

COUNTY OF MADISON

JERRY W. IKARD, being first duly sworn, deposes and says that he is the owner of Ikard Manufacturing Company and owns 100% of the stock of IMCO, INC., that he has read the foregoing Verified Complaint for Declaratory and Injunctive

Relief and knows the contents thereof, and verifies that this Complaint is true to the best of his knowledge, information and belief. Executed on this the 29th day of December, 1989.

(Signatures)

Jerry W. Ikard, individually
Jerry W. Ikard d/b/a Ikard Manufacturing Company and as sole shareholder of IMCO, Inc.

Subscribed and sworn to before me this 29th day of December, 1989.

Morris J. Brooks, Jr. /s/
Notary Public
My Commission Expires: 8-10-93

6. Lengthy Statutes and Federal Acquisition Regulations

5 U.S.C. 702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be

entered against the United States: **Provided,** That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or title), and their successors in office, personally responsible for compliance. . . .

5 U.S.C. 704. Actions Reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . .

5 U.S.C. 705. Relief pending review

. . . On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari

or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not

in accordance with law;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law; . . .

15 U.S.C. 631. Declaration of Policy

(a) The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and

well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to

maintain and strengthen the over-all economy of the Nation.

15 U.S.C. 637(b)(7)(A):

(b) It shall also be the duty of the Administration and it is empowered, whenever it determines such action is necessary --

(7)(A) To certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity of any small business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer or an officer engaged in the sale and

disposal of Federal property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration.

28 U.S.C. Section 1254(1):

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. 2201. Creation of Remedy

(a) In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing

of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. 2201. Further Relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. 1361

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. 1391. Venue generally

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or . . . (4) the plaintiff resides if no real property

is involved in the action.

Federal Acquisition Regulation 9.101

9.101 Definitions.

"Responsible prospective contractor" means a contractor that meets the standards in 9.104.

Federal Acquisition Regulation 9.104-1

9.104-1. General Standards.

To be determined responsible, a prospective contractor must--

(a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(b));

(b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;

(c) Have a satisfactory performance

record (see 9.104-3(c));

(d) Have a satisfactory record of integrity and business ethics;

(e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them . . .;

(f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(b)); and

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

Federal Acquisition Regulation 9.104-3

9.104-3 Application of Standards.

(e) Small Business Concerns. If a small business concern's offer that would otherwise be accepted is to be rejected because of a determination of

nonresponsibility, the contracting officer shall refer the matter to the Small Business Administration, which will decide whether or not to issue a Certificate of Competency (see Subpart 19.6).

Federal Acquisition Regulation 9.400

9.400 Scope of Subpart.

(a) This subpart--

(1) Prescribes policies and procedures governing the debarment and suspension of contractors by agencies for the causes given in 9.406-2 and 9.407-2;

Federal Acquisition Regulation 9.402

9.402 Policy.

(a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions

that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart.

Federal Acquisition Regulation 9.406-2

9.406-2 Causes for Debarment.

The debarring official may debar a contractor for any of the causes listed in paragraphs (a) through (c) following:

(c) Any other cause of so serious or

compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.